No. 85-6790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALDO E. GRANBERRY,

Petitioner,

vs.

JIM GREER, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether, in a habeas corpus proceeding brought by a state prisoner pursuant to 28 U.S.C. §2254, the state forfeits the defense of non-exhaustion of state court remedies by failing to raise that issue in the district court.

2. Whether Petitioner exhausted his state court remedies by presenting the state's highest court with a motion for leave to file a petition for writ of mandamus, when denial of the motion does not constitute a decision on the merits and where further recourse to state courts is not shown to be futile.

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BRIEF FOR THE RESPONDENT

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

In addition to those items set forth in petitioner's brief, respondent relies on the following constitutional provision and statute:

Constitution of Illinois (1970)
Article 6, Section 4(a)

> The Supreme Court may exercise original jurisdiction in cases relating to revenue, mandamus, prohibition or habeas corpus and as may be necessary to the complete determination of any case on review.

Illinois Revised Statutes (1985)
Chapter 14, Paragraph 5(4)

The duty of each state's attorney shall be:

(4) To defend all actions and proceedings brought against his county, or against any county of State officer, in his official capacity, within his county.

STATEMENT OF THE CASE

The Statement of the Case contained in petitioner's brief adequately sets forth the historic facts necessary for resolution of the questions presented, subject to the following additions:

1. The petition for writ of habeas corpus alleged a denial of due process as well as an *ex post facto* claim. (J.A. 11)

2. The action was dismissed on April 18, 1983. A certificate of probable cause was denied by the district court on May 31, 1983. A certificate of probable cause was granted and counsel was appointed by the court of appeals on January 25, 1985. On March 25, 1985, Judge Bua of the United States District Court for the Northern District of Illinois, Eastern Division, dismissed an unrelated Section 2254 petition for failure to exhaust available state court remedies, ruling that denial of a motion for leave to file a petition for writ of mandamus in the Illinois Supreme Court did not satisfy the exhaustion requirement. The brief for the respondent was filed in the court of appeals on May 10, 1985. Because of the relevance of that holding, a copy of Judge Bua's unreported opinion in *U.S. ex rel. Carbona v. Huch*, No. 85 C 1750 (N.D. Ill.) is attached as Appendix 2 to this Brief.

SUMMARY OF ARGUMENT

Although federal courts clearly have subject-matter jurisdiction to grant writs of habeas corpus to prisoners in state custody, that jurisdiction is subject to the precepts of the exhaustion doctrine. Because the exhaustion doctrine promotes the crucial concepts of comity and federalism, it admits of only two narrow exceptions, neither of which is present in this case.

The exhaustion doctrine furthers the legitimate goals of fostering state court participation in the development of federal constitutional litigation, and serves essential purposes of comity and federalism:

1) by reducing friction between state and federal courts by allowing state courts the first opportunity to pass upon and correct alleged violations of constitutional law;
2) by avoiding disruption of the orderly progression of state issues and cases;
3) by allowing state courts to participate in the development and application of federal constitutional law; and
4) by helping to develop a sense of increased respect for the United States Constitution within the state courts.

In addition, the rule serves federal judicial economy by allowing the opportunity for refinement of issues and full factual development and by allowing the resolution of meritorious claims before the cases come to the federal forum.

As such, it directly implicates the parallel interests of the federal and state judiciaries, interests which may not be waived or forfeited by members of a state's execu-

tive branch. In this case, wherein petitioner has clearly failed to avail himself of an existing state remedy, it would be inappropriate to deny the State of Illinois the opportunity to assert their defenses under the exhaustion doctrine because of the failure to assert those defenses in an initial answer to a petition for habeas corpus.

Moreover, even if an express effort were made to forego exhaustion defenses by a state official, no caselaw of this Court or statutory authority will support petitioner's claim that such defenses are waived upon the respondent's unilateral decision that some other interest outweighs the considerations underlying exhaustion. At most, an express effort to waive the exhaustion defenses by respondent's counsel would permit a federal court to evaluate whether such a waiver satisfies any of the narrow exceptions to the doctrine itself. In no event may the doctrine's goals be declared forfeit merely by silence, for such would nullify a doctrine designed to foster broader notions of federalism and comity.

Finally, because it is apparent that the petitioner in this case has failed to exhaust available state remedies, the decision of the court of appeals dismissing his petition on that basis must be affirmed.

ARGUMENT

I.

THE RESPONDENT DID NOT FORFEIT APPLICATION OF THE EXHAUSTION REQUIREMENT BY FAILING TO ASSERT AN EXHAUSTION DEFENSE IN THE DISTRICT COURT.

For fully a century this Court has insisted that state prisoners seeking federal habeas corpus relief (28 U.S.C. § 2254) must first present their constitutional claims to the state courts wherein they were convicted. This concept, referred to as the exhaustion doctrine, promotes crucial interests of comity and federalism in an area where the potential for friction between the state and federal judicial systems is particularly high. Because of its importance, the exhaustion doctrine is rigidly enforced and has been held subject to only two narrow exceptions.

The petitioner in the case at bar, having failed to exhaust an available state remedy before applying for federal habeas corpus relief, now urges upon the Court a third exception, not heretofore established by any decision of this Court. He submits that the exhaustion requirements need not apply where there has been an explicit waiver, or indeed even an inadvertent forfeiture, of the benefits of that doctrine by counsel for a respondent state official.

Such a novel exception finds no historical support in the habeas corpus statute or the precedent of this Court. Worse, it runs counter to the underlying principles fostered by the doctrine itself. As such, it is imperative that this Court continue its tradition of consistent adherence to the exhaustion doctrine.

A.

The Historical Development Of The Exhaustion Doctrine Recognized Only Two Exceptions To That Requirement, Neither Of Which Is Present Here.

When this Court established the exhaustion requirement in *Ex Parte Royall*, 117 U.S. 241, 250-251 (1886), it explained that, while federal courts have discretionary jurisdiction upon writ of habeas corpus to inquire into the basis of custody on state authority,

> that discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

Id.

Twelve years later this Court observed in *Baker v. Grice*, 168 U.S. 284, 290 (1898), *overruled on other grounds, Hensley v. Municipal Court*, 411 U.S. 345, 351, n.8 (1973), that the development of the caselaw since *Royall* made it appear clearly that "as the settled and proper procedure" federal courts "ought not to exercise [their habeas corpus] jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency. . ." *See also New York v. Eno*, 155 U.S. 89 (1894); *Minnesota v. Brundage*, 180 U.S. 499, 502 (1901). Shortly thereafter, this Court briefly discussed the requirement and flatly asserted that federal courts will intervene by writ of habeas corpus in advance of final action by the highest court of the state "only in certain exceptional cases." *Reid v. Jones*, 187 U.S. 153, 154 (1902).

The exhaustion requirement and its lone exception based on peculiar urgency were reiterated and strengthened in *Urquhart v. Brown*, 205 U.S. 179 (1907). *Urquhart*, like this case, involved a challenge, not to trial error, but to the constitutional validity of a state statute. In *Urquhart*, this Court explained that the exceptional cases in which exhaustion may not be required

> are those of great urgency that require to be promptly disposed of, such, for instance, as cases involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations.

Urquhart, 205 U.S. at 182.

In *Rose v. Lundy*, 455 U.S. 509, 516 (1981) this Court observed that this was the state of the exhaustion requirement, as expressly reflected in *Ex Parte Hawk*, 321 U.S. 114, 117 (1944), when it was codified as part of the Judicial Code of 1948 (ch. 646, § 2254, 62 Stats., 869, 967 (1948)). The narrow special circumstances contemplated by *Urquhart* have seldom been found by this Court. *See e.g., Ohio v. Thomas*, 173 U.S. 276 (1899) (finding exception where imprisonment of federal officer may have impeded operations of federal government); *Re Neagle*, 135 U.S. 1 (1890) (finding exception where deputy U.S. Marshall committed killing in exercise of his duty of protecting supreme court justice); *Minnesota v. Brundage*, 180 U.S. 499 (1901) (no exception where state court action may be inconsistent with decisions of this Court or where case involves issue of business or public interest).

In *Duckworth v. Serrano*, 454 U.S. at 1, 2-3 (1981) (*per curiam*), this Court made clear that even a "clear violation of a petitioner's rights," coupled with an interest in judicial economy, will not excuse exhaustion. The *Serrano* Court interpreted *Ex Parte Royall* and its progeny as allowing

circumvention of the exhaustion requirement where the state courts provide no opportunity for redress, or where the state "corrective process is so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano, supra,* 454 U.S. at 3. Subsequent to *Serrano,* however, the decision in *Rose* drew from the language of *Hawk* to make clear that the futility exception discussed in *Serrano* is a separate concept from exceptional circumstances of peculiar urgency. *Rose, supra,* 455 U.S. at 516, n.7.

The second narrow exception to the exhaustion requirements of *Royall* is referred to as the "futility exception", a term which has been used to describe two slightly different concepts. The narrower view of "futility" is applied in cases where the highest state court has recently addressed the issue and decided it adversely to petitioner in the absence of any intervening decision of this Court or any other indication that the state court is likely to change its position. *See Sweet v. Cupp,* 640 F.2d 233, 236 (9th Cir. 1981) (discussing the futility exception and its purpose). A slightly broader test of futility is expressed in *Duckworth v. Serrano,* where this Court explained that the exception is made "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."

In any event, futility and exceptional circumstances, however defined, are the only two narrow exceptions this Court has recognized to the exhaustion requirement. In all other cases, even though the requirement is not truly jurisdictional, the exhaustion requirement has been rigidly enforced by this Court. Petitioner asks this Court to create yet a third exception based on the supposedly implicit representation by counsel for respondent that other con-

cerns or state interests should excuse the requirement. This Court's unwavering insistence on enforcement of the exhaustion requirement is well-founded in view of the importance of the considerations underlying the requirement and should not yield to petitioner's request.

B.

The Interests Promoted By The Exhaustion Doctrine Are Essential To The Maintenance Of An Orderly Federal System, And Would Be Defeated If Concepts Of Waiver Or Forfeiture Were Allowed To Excuse Adherence To That Doctrine.

The exhaustion requirement serves at least four essential purposes of comity and federalism:

1) by reducing friction between state and federal courts by allowing state courts the first opportunity to pass upon and correct alleged violations of constitutional law;
2) by avoiding disruption of the orderly progression of state issues and cases;
3) by allowing state courts to participate in the development and application of federal constitutional law; and
4) by helping to develop a sense of increased respect for the United States Constitution within the state courts.

This Court has recently explained that "[t]he exhaustion doctrine is principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy,* 455 U.S. 509, 518 (1981); *See also Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 490 (1973) ("(e)arly federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby

remove their understanding of and hospitality to federally protected interests").

The doctrine also "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*).

Finally, the rule serves federal judicial economy by allowing the refinement of issues and the development of supporting facts before the case reaches the federal forum. The rule also reduces the number of cases presented in federal court by allowing for resolution of meritorious claims by state courts.

Respondent urges this Court to conclude that consideration of these compelling interests should not be foreclosed by forfeiture, or even explicit waiver, based on the conduct of counsel from a state's executive branch, whose interests may or may not be co-extensive with those of the state judiciary. The concerns underlying the exhaustion doctrine require a federal court to consider whether futility or special circumstances exist to justify the exercise of its discretion, even in the face of an explicit waiver of exhaustion by counsel for the respondent. Even an explicit waiver, while a relevant factor to the court's determination, should not strip the court of the ability to exercise its discretion.

In this case, as in most section 2254 cases arising in Illinois,[1] the respondent is warden of a correctional facili-

[1] Had the custodian been one of the 102 county sheriffs in Illinois, he or she would have been represented by the state's attorney for his county. *See* Ill. Rev. Stat. 1985, ch. 14, § 5. *See e.g., People ex rel. Smith v. Elrod*, 511 F. Supp. 559 (N.D. Ill.

(Footnote continued on following page)

ty, an officer of the executive branch; counsel for respondent, an assistant attorney general, was similarly an officer of the executive branch. The Attorney General of the State of Illinois is "the legal officer of the state." Ill. Const. Art. 5, § 15. In that capacity, the Attorney General's duties include that he "defend all actions and proceedings against any state officer, in his official capacity, in any of the courts of this state or in the United States." Ill. Rev. Stat. 1985, ch. 14, § 4. Similarly, in accord with his mandate, the Attorney General represents all of the judges and justices of the Illinois judicial system in their capacity as state officers. In addition, the Attorney General enjoys all of the powers assigned to that office at common law. *See Fergus v. Russell*, 270 Ill. 304, 110 N.E. 130 (1915); *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 359 N.E.2d 141 (1976).

Petitioner argues that the Attorney General, as the chief legal officer of the state, can waive or forfeit the exhaustion requirement because comity is a concept related to federal-state relations overall and not restricted to judicial relationships. He correctly points out that in *Preisser v. Rodriguez*, 411 U.S. 475, 491 (1973), this Court explained that considerations of comity have relevance beyond the case where state judicial action is being attacked. That observation, however, does not alter or extinguish the particularized concerns of comity and federalism when it is a judicial action that is in issue.

As a broad generalization, it is true that the concepts of comity and federalism implicate the relationship between

[1] *continued*
1981). Although individual county prosecutors may occasionally appear as counsel for respondent in a section 2254 proceeding, they are not statutorily empowered to speak for the Illinois judiciary as a whole.

the federal government and a sovereign state. But in the specific context of section 2254 cases, the specific interests furthered by the exhaustion doctrine most directly implicate the distinct roles played, in a federal system, by the federal judiciary and the state judiciary. These unique interests are negatively affected by any doctrine which permits a judicial interest to be evaulated and waived by an executive officer.

Petitioner also argues that because the Attorney General is the state's chief legal officer he should be allowed to determine whether the state's interests in comity should be abandoned in the face of other important state interests. He asserts that failure to recognize the Attorney General's authority and role in deciding whether to waive the judiciary's interests "denigrates his constitutional authority and unnecessarily increases the friction between the state and federal governments." (Pet. Brief at 18).

This position is difficult to reconcile with the Attorney General's own insistence in this case that the judiciary's interests be preserved and enforced despite the obvious administrative economy in allowing the court of appeals to determine the merits of a case which seems extremely likely to be ultimately decided in respondent's favor. *See also Crump v. Lane,* No. 86-1286 (7th Cir. 1986) (attached hereto as App. 1).

Accordingly, the exhaustion rule must be enforced in all Section 2254 cases arising out of Illinois which are not subject to exception for futility or exceptional circumstances of peculiar urgency. A federal court should never be bound by even an explicit waiver of exhaustion. Rather, the court should consider the waiver, and any explanation offered for it, only as part of its analysis of whether futility or some extreme circumstances exist to justify exception

to the rule. *See United States ex rel. Trantino v. Hatrack,* 563 F.2d 86, 96-97 (3rd Cir. 1977) (waiver amounts to nothing more than notice that the state is unopposed to the court reaching the merits); *See also Naranjo v. Ricketts,* 696 F.2d 83 (10th Cir. 1982); *Sweet v. Cupp,* 640 F.2d 233 (9th Cir. 1981); *Needel v. Scafati,* 412 F.2d 761 (1st Cir.), *cert. denied,* 396 U.S. 861 (1969).

The interests of the state and federal judiciaries are compelling. They are simply not interests that state prosecutors have been, or should be, empowered to yield. *See Naranjo v. Ricketts, supra,* 696 F.2d 83, 87 (10th Cir. 1982) ("the state court interest in having 'an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights' is simply not an interest that state prosecutors have been empowered to yield").

Indeed, even if a state prosecutor were empowered to explicitly waive the interests of the Illinois judiciary, he could not waive the interests of encouraging state court participation in enforcement of federal constitutional law and its related goals of experimentation and growth in the development of constitutional law and preservation of a national system of courts dedicated to the supremacy of the constitution. *Cf., Braden v. 30th Judicial Circuit Court, supra,* 410 U.S. 484, 490 (1973).

The cases relied on by petitioner as representative of analogous areas of the law are not applicable to this case. *Ohio v. Bureau of Employment Services v. Hodory,* 431 U.S. 471 (1977), which allowed the state to waive similar interests by voluntarily submitting to federal jurisdiction, should not be extended to Section 2254 cases. In *Hodory,* an *amicus* relied on the abstention doctrine of *Railroad Comm's v. Pullman,* 312 U.S. 496 (1941), to urge this Court to remand a case for dismissal, while the state explicitly resisted such a remand in a case involving the con-

stitutionality of a state unemployment compensation law. In the district court the state had argued abstention but the court expressly concluded that the abstention doctrine did not bar the suit. The state then appealed to this Court and abandoned the abstention argument. This Court held that *Hodory* was not a *Pullman*-abstention case, but was controlled by *Younger v. Harris*, 401 U.S. 37 (1971),[2] and then held that although this case was within the purview of *Younger*, that doctrine need not be enforced when the state voluntarily submits to the federal jurisdiction.

Initially, it may be noted that *Hodory* is not inconsistent with the rule urged in this case, in that the exhaustion doctrine is not without some exception, i.e., the "futility" and "special circumstances" principles discussed above. Limiting the exceptions to these two narrow instances, however, even in the face of an explicit waiver, is not inconsistent with *Hodory* in view of the recognition in *Younger* that the considerations underlying that decision are particularly compelling in cases involving state criminal prosecutions. *Younger v. Harris, supra*, 401 U.S. at 43. While not an ongoing prosecution, the underlying issue here goes directly to the scheme for enforcement of state criminal sentences and is equally compelling.

Petitioner's additional cases involving the waiver of personal rights by parties have no bearing on this case where the interests at stake do not belong to the parties. *See, e.g., Clark v. Barnard*, 108 U.S. 436 (1883).

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[2] *Pullman*-abstention focuses on the possibility that the State may interpret a statute in a manner which may eliminate or materially alter the constitutional question. *Younger*-abstention focuses on the importance of state court participation in the determination of federal constitutional claims." 431 U.S. at 477.

This Court should determine in this case that the nature of the interests underlying the exhaustion requirement are sufficiently compelling and unique to require federal courts to satisfy themselves that either futility or exceptional circumstances justify abandonment of the requirement. While an explicit waiver by counsel for respondent, accompanied by the reasons for the waiver, should be helpful to the court in making its assessment, waiver cannot preclude the court from making its own determination. *See, United States ex rel. Trantino v. Hatrack*, 563 F.2d 86 (1977).

Nonetheless, even if this Court determined that the attorney general could explicitly waive exhaustion, policy considerations dictate against inferring forfeiture solely from the failure of respondent's counsel to raise an exhaustion defense in his initial response to the petition.

In a Section 2254 proceeding arising out of Illinois, the attorney general represents specific executive branch clients who are generally either corrections or parole authorities. In cases where the constitutionality of a statute is in issue, as here, he must also protect interests of the legislature. In all Section 2254 actions he must protect interests of the judiciary whether the case relates directly to the integrity of a judicial proceeding or whether the interest is concerned more with the state court's role in interpreting and applying state law and the federal constitution.

Although the state judiciary is not a party to a Section 2254 proceeding, the judiciary is a client of the attorney general. While this relationship is not precisely akin to a traditional attorney-client relationship (*See E.P.A. v. Pollution Control Bd.*, 69 Ill. 2d 394, 401, 372 N.E.2d 50 (1977)), the Attorney General cannot, in accord with his duties and obligations, simply ignore the interests of the judiciary. The importance he places on his duty to the

judiciary is evidenced in the facts of both this case and *Crump v. Lane, supra,* (A-1) where after prevailing on the merits in the district court and while fully expecting to prevail on the merits in the court of appeals, he sought dismissal for exhaustion when it became apparent that the claim remained unexhausted. He did so with the recognition that administrative and even judicial expedience are not special circumstances which can justify scrapping the interests underlying the exhaustion requirement. *Duckworth v. Serrano, supra,* 454 U.S. at 3 (reversing a writ issued despite failure to exhaust where the court of appeals had relied on a "clear violation of rights" and judicial economy in finding that exhaustion was not required).

The Attorney General of Illinois, therefore, in accord with his duties and obligations cannot ignore the judiciary's interests. For this reason, anything but an explicit and explained attempt to waive exhaustion can only be indicative of lack of development of the law, mistake or inadvertence. In this case, the fact that the State did not intend to waive exhaustion is obvious from the fact that the issue was pressed on appeal when respondent's counsel realized that the case was unexhausted.

The petition below was prepared in August, 1983 (J.A. 8). An assistant attorney general moved the magistrate to dismiss the petition for failure to state a claim before filing an Answer pursuant to Rule 5. 28 U.S.C. foll. § 2254, Rule 5. The respondent did not address exhaustion in his motion. While that motion was pending, the United States Court of Appeals for the Seventh Circuit reversed the opinion on which petitioner had based his claim. As a result, the magistrate recommended that the petition be denied and the district court agreed on April 18, 1984 (J.A. 18-21).

Nearly one year later Judge Bua of the United States District Court for the Northern District of Illinois in dismissing a Section 2254 petition *sua sponte* in an unpublished Order, held for the first time that denial of a motion for leave to file a petition for writ of mandamus by the Illinois Supreme Court does not satisfy the exhaustion requirement. *United States ex rel. Carbona v. Huch,* No. 85 C 1750 (March 26, 1985) (A-17).

Respondent then urged a similar argument in his brief before the Circuit Court of Appeals, which was filed on May 10, 1985. The case at bar was the first time that the court of appeals adopted the position previously announced by Judge Bua in *Carbona.*

Even if this Court were willing to accept petitioner's argument that the Attorney General has the power to determine that some other state interest offsets the concerns of comity and, in accord with that determination, to expressly waive the interests of the judiciary, that argument should not be extended to cases where, as here, no such determination was made. The attorney general has made clear that Illinois desires that the exhaustion doctrine be enforced in this case from the earliest indication that there was a failure to exhaust.

Finally, and contrary to petitioner's position, requiring exhaustion in the absence of futility or special circumstances is consistent with *Wainwright v. Sykes,* 433 U.S. 72 (1977) and its progeny, regardless of how or when the failure to exhaust is brought to the attention of, or discovered by, the federal court. The rule of *Wainwright,* like the exhaustion requirement itself, was developed to encourage petitioners to fully litigate their constitutional claims in the state courts. See *Wainwright v. Sykes,* 433 U.S. at 81-83. Similarly, rigid adherence to the exhaustion doctrine promotes the parallel goals of permitting

state courts an equal participatory share in the development of constitutional jurisprudence. If anything, petitioner's efforts to seek application of the *Wainwright* default doctrine to questions of exhaustion are contrary to the underlying principles of comity and federalism inherent in both the procedural default doctrine and the exhaustion doctrine.

Respondent urges this Court to hold that a federal court on Section 2254 review should refuse to consider any unexhausted petition not subject to exception for futility or special circumstances, regardless of how or when the failure to exhaust comes to the court's attention.

II.

THE PETITIONER HAS NOT EXHAUSTED HIS AVAILABLE STATE COURT REMEDIES.

A.

A Motion For Leave To File A Petition For Writ Of Mandamus In The Illinois Supreme Court Does Not Satisfy The Exhaustion Requirement.

Petitioner contends that he exhausted his available state court remedies by filing a motion for leave to file a petition for writ of *mandamus* in the Illinois Supreme Court. Petitioner's argument is wholly without support in either federal or Illinois caselaw. The Illinois Supreme Court's denial of petitioner's motion for leave to file a petition for writ of mandamus clearly did not amount to an adjudication on the merits of his claim.

Original jurisdiction *mandamus* in the Illinois Supreme Court is authorized by the Illinois Constitution, Ill. Const. Art. 6, § 4(a), and procedurally governed by Supreme Court Rule 381. 87 Ill. 2d, at 420 (1981); Ill. Rev. Stat. 1985, ch. 110A, ¶ 381.

The Illinois Supreme Court's discretionary jurisdiction in mandamus is normally exercised only where no ordinary remedy is available or adequate. *Hughes v. Kiley*, 67 Ill. 2d 261, 266, 367 N.E.2d 700, 702 (1977); *See also, People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 400, 396 N.E.2d 759 (1975) (writ entertained where the issue is "novel" and appears "to be of considerable importance to the administration of justice"); *People v. Lueders*, 287 Ill. 107, 112, 122 N.E. 374 (1919) (the exercise of mandamus jurisdiction "by this court is discretionary, and the court will assume jurisdiction in cases only where there is a special reason and the remedy in the trial court is ineffective. . .").

Contrary to petitioner's suggestion, the Illinois Supreme Court's refusal to exercise this extraordinary jurisdiction is not an adjudication on the merits and does not preclude seeking relief in the circuit court and eventually perfecting an appeal to the Illinois Supreme Court. *Monroe v. Collins*, 393 Ill. 553, 556-557, 66 N.E.2d 670, 672 (1946); *See also Torjesen v. Smith*, 114 Ill. App. 3d 147, 448 N.E.2d 273 (5th Dist. 1983), *appeal dismissed*, 465 U.S. 1015.

The denial of leave to file a petition for writ of mandamus in the Illinois Supreme Court is, therefore, not an adjudication on the merits and it is not a refusal by the state judiciary to consider a claim.

The decisions of this Court make it clear that a state supreme court's denial of a petition for an extraordinary writ does not satisfy the exhaustion requirement where the denial does not constitute an adjudication on the merits. *See Pitchess v. Davis*, 421 U.S. 482, 488 (1975); *Ex Parte Hawk*, 321 U.S. 114, 116 (1944). *Pitchess* relies on this Court's teaching in *Picard v. Connor*, 404 U.S. 270, 275-276 (1971), that exhaustion of state court remedies re-

quires that claims be exhausted by fair presentation to the state courts and not merely by passage through the state courts. *Pitchess, supra,* 421 U.S. at 487.

B.

Petitioner Should Not Be Heard To Argue The Futility Of Taking His Claim To State Court Where The Same Showing Is Required There As In Federal Court.

Invoking the "futility" exception to the exhaustion rule discussed in *Duckworth v. Serrano, supra,* 454 U.S. 1, 4 (1981), petitioner argues that relief on his *ex post facto* claim is precluded in Illinois because of the decision in *Harris v. Irving,* 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980). In *Harris,* the court rejected an *ex post facto* argument virtually identical to that raised by petitioner.

At the outset, petitioner does not address the exhaustion of his due process claim. That claim is clearly cognizable in an Illinois mandamus proceeding. *See United States ex rel. Johnson v. McGinnis,* 734 F.2d 1193 (7th Cir. 1984). As a result, even if his *ex post facto* claim is within the "futility" exception, the failure to exhaust the due process claim requires dismissal of the entire petition. *Rose v. Lundy,* 455 U.S. 509 (1982). Nonetheless, petitioner's futility argument should be rejected.

As discussed above, the "futility exception" is a term which has been used to describe two slightly different concepts. The narrower view of "futility" is applied in cases where the highest state court has recently addressed the issue and decided it adversely to petitioner in the absence of any intervening decision of this Court or any other indication that the state court is likely to change its position. *See Sweet v. Cupp,* 640 F.2d 233, 236 (9th Cir. 1981) (discussing the futility exception and its purpose).

While the Illinois Supreme Court did deny discretionary leave to appeal in *Harris* pursuant to Illinois Supreme Court Rule 315 (104 Ill. 2d at XXV, Ill. Rev. Stat. 1985, ch. 110A, ¶ 315), that court has never entertained the merits of a claim similar to that raised by petitioner in this action. *See People v. Vance,* 76 Ill. 2d 171, 183, 390 N.E.2d 867, 872 (1979) (denial of a petition for leave to appeal carries no connotation of approval or disapproval of the appellate court's action).

Thus, while it is true that the only appellate court to have addressed the issue did reject it, the highest state court has not considered this issue on the merits. As a result, this futility exception is not applicable to this case.

The broader test of futility expressed in *Duckworth v. Serrano, supra,* 454 U.S. 1, 3 (1981), explains that the exception is made "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."

This exception also does not apply to this case. An available avenue for relief clearly exists through a petition for writ of mandamus in circuit court and the claim is not precluded by any ruling of the state supreme court. Since mandamus is an appropriate vehicle for considering statutory constitutionality (*See People ex rel. Scott v. Kerner,* 32 Ill. 2d 539, 208 N.E.2d 561 (1965)), the remedy would be identical to that available to petitioner if he could prevail under Section 2254.

Under either approach to futility, therefore, the exception has no application in this case.

Moreover, even if the exception were applicable, the peculiar circumstances attendant to this case militate against the application of the futility exception.

In *Harris* the Appellate Court of Illinois rejected the *ex post facto* argument advanced by petitioner. In *Welsh v. Mizell*, 668 F.2d 328 (7th Cir.), *cert. denied*, 459 U.S. 923 (1982), the court mentioned and rejected *Harris*, in holding that the 1973 revisions to Ill. Rev. Stat. ch. 38, ¶ 1003-3-5(c), violated the *Ex Post Facto* Clause (U.S. Const. art. 1, § 10, cl. 1) when applied to inmates sentenced for crimes committed prior to the adoption of that section.

Two years later, in *Heirens v. Mizell*, 729 F.2d 449, 459 (7th Cir.), *cert. denied*, 469 U.S. 842 (1984), the court explicitly reversed the *ex post facto* holding of *Welsh*, placing the state and federal courts in agreement on the question.

Having been rejected by the middle level appellate courts of both jurisdictions petitioner's claim is equally "futile" in federal and state court. In this Court, petitioner "strongly contends" that the decision in *Heirens* is incorrect and that he believes that he can demonstrate that the statute is an *ex post facto* law "as applied to him." Pet. Brief at 22, fn. 2. If petitioner does indeed have a convincing *ex post facto* argument, that argument should be as convincing in the Appellate Court of Illinois, Fifth District, as it could be in the United States Court of Appeals for the Seventh Circuit. It is well-settled that state courts of original jurisdiction are both competent to decide federal constitutional questions and are under an "obligation to render such decision as will give full effect to the supreme law of the land and protect any right secured by it to the accused [which] is the same that rests upon the courts of the United States." *New York v. Eno*, 155 U.S. 89, 98 (1894); See also *Ex Parte Royall*, 117 U.S. 241, 251 (1886). (State courts are "equally bound to guard and protect rights secured by the Constitution.")

Allowing the state court to consider the claim in the first instance avoids requiring a federal court to interpret and apply a state procedural statute and its related administrative rules with regard to a specific constitutional claim without the benefit of the guidance of a state court. Moreover, failure to allow the state court to review the issue before it is taken to a federal forum deprives Illinois of the first opportunity to correct its own problems. *See United States ex rel. Sostre v. Festa*, 513 F.2d 1313, 1319 (2d Cir.) (Feinberg, J., concurring), *cert. denied*, 423 U.S. 841 (1975) (state should be allowed the opportunity to keep its own house in order). Whatever petitioner's convincing new argument may be, it must first be presented to the courts of Illinois.

The available state remedy in this case is capable of providing petitioner a hearing on his claim which would be as full and fair as a Section 2254 proceeding and which would be equally adequate in that it can provide the same relief that petitioner could obtain in federal court if he can prevail. In both forums petitioner will be required to direct an argument to an Illinois statute which is sufficient to overcome adverse precedent in both jurisdictions. If petitioner's argument is futile, it is futile in both courts. Conversely, if it is strong, it is equally strong in both courts which are equally bound to uphold and enforce the Constitution.

Because it is an Illinois statute and Illinois procedures which are implicated by petitioner's claim, the courts of Illinois must have the first opportunity to consider his new or additional argument. *Serrano, supra.*

CONCLUSION

The state did not forfeit the defense of non-exhaustion of state court remedies by failing to raise that issue in the district court. Petitioner has not exhausted his available state court remedies.

For the reasons stated herein, respondent respectfully prays that the judgment of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-1286

PAUL O. CRUMP,

Petitioner-Appellant,

v.

MICHAEL P. LANE, Director, Illinois Department of Corrections, et al.,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 7043—**Paul E. Plunkett**, *Judge.*

ARGUED OCTOBER 20, 1986—DECIDED DECEMBER 19, 1986

Before BAUER, *Chief Judge,* CUMMINGS and EASTERBROOK, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This action challenges a series of decisions by the Illinois Prisoner Review Board ("the Board") denying plaintiff's release on parole on eight separate occasions between February 1977 and April 1984. Plaintiff seeks both money damages and declaratory relief under 42 U.S.C. § 1983 and a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On March 19, 1953, plaintiff Paul Crump was convicted of killing an unarmed security guard during a robbery. Crump was sentenced to death for the murder. In 1955

the Illinois Supreme Court reversed Crump's conviction and remanded the case for a new trial. Crump was retried and again convicted of murder and sentenced to death. On August 1, 1962, his sentence of death was commuted to a term of "199 years, without parole." In 1976 the "without parole" provision was stricken from the previous commutation order. Between February 1977 and April 1984, Crump has been considered for parole by the Board eight times, and the Board has denied parole each time.

Plaintiff filed the present action in federal district court on November 17, 1982. Plaintiff twice amended his complaint to add challenges based on the 1983 and 1984 denials of parole. After a full evidentiary hearing, the district court denied Crump's petition for a writ of habeas corpus and entered judgment in favor of the defendants on all other claims. It is from these judgments that plaintiff appeals.

I.

The defendants assert that this Court is precluded from reviewing the merits of plaintiff's claims because he has failed to exhaust his available state court remedies as required by 28 U.S.C. § 2254(b). They contend that plaintiff must seek a writ of mandamus in an Illinois circuit court before the exhaustion requirement may be deemed satisfied.

This is not the first time that the exhaustion requirement has been at issue in this case. On December 18, 1984, the district court dismissed the habeas portion of plaintiff's complaint for failure to exhaust his state remedies for denial of parole because he had failed to seek a writ of mandamus in the Illinois courts in accordance with this Court's decision in *United States* ex rel. *Johnson v. McGinnis*, 734 F.2d 1193 (7th Cir. 1984). Plaintiff then proceeded to file a motion for leave to file a petition for an original writ of mandamus with the Illinois Supreme Court, which was denied on June 25, 1985. Finding that plaintiff had exhausted all state remedies, the district court reinstated plaintiff's action on July 30, 1985.

Relying on our decision in *Granberry v. Mizell*, 780 F.2d 14 (7th Cir. 1985), certiorari granted *sub nom. Granberry v. Greer*, 107 S. Ct. 62 (No. 85-6790), defendants argue that plaintiff must seek a writ of mandamus in an appropriate Illinois circuit court. In essence, their position is that the Illinois Supreme Court's denial of the motion for leave to file a petition for a writ of mandamus was not a decision on the merits and thus plaintiff must now seek a writ in circuit court.

Plaintiff attempts to distinguish his case from the factual situation before this Court in *Granberry*. In *Granberry*, the Illinois Supreme Court denied the petitioner's motion seeking leave to file a petition for a writ of mandamus "without prejudice to proceeding in any appropriate circuit court for consideration of the question presented." 780 F.2d at 16. In contrast, plaintiff argues, the language used by the Illinois Supreme Court in his case was merely "Motion *denied*." (Plaintiff's Reply Br. App. 1). Plaintiff draws a negative inference from the language used by the Illinois Supreme Court in the *Granberry* case to demonstrate that the motion for leave to file in his case was denied with prejudice.

The exhaustion issue here obviously turns on what *res judicata* effect the Illinois courts give to a denial by the Illinois Supreme Court of a motion for leave to file a petition for a writ of mandamus. Plaintiff has provided us with no Illinois caselaw to support his proposition that the denial was a ruling on the merits and accordingly with prejudice. The Illinois Attorney General has cited the case of *People* ex rel. *Yarrow v. Leuders*, 287 Ill. 107, 122 N.E. 374 (1919), as authority for the proposition that the denial was not a ruling on the merits and thus without prejudice. Our reading of the *Leuders* case, however, does not yield the proposition that the Attorney General claims. In *Leuders*, the Illinois Supreme Court held that the exercise of its original jurisdiction in mandamus is discretionary and that it would assume jurisdiction in a mandamus case "where there is a special reason and the remedy in the trial court is ineffective" even though an identical proceeding was pending in a lower court. 287 Ill. at 112, 122 N.E. at 376.

Leuders did not address the question of whether the Illinois Supreme Court's denial of a motion for leave to file a petition for a writ of mandamus would preclude the petitioner from refiling the petition in circuit court.

Our own research has revealed several Illinois cases which hold that the Illinois Supreme Court's denial of a motion for leave to file is without prejudice to refiling in the circuit court. In *Monroe v. Collins*, 393 Ill. 553, 66 N.E.2d 670 (1946), the Illinois Supreme Court held that an order denying leave to file an original action in the Illinois Supreme Court is not an adjudication on the merits and does not preclude the plaintiff from prosecuting an action seeking the same relief in a circuit court and eventually perfecting an appeal to the Illinois Supreme Court. 393 Ill. at 556-557, 66 N.E.2d at 672. The court based its holding on the nature of the motion for leave to file an original action:

> [T]he procedure in making the application and the order of denial does not include the fundamentals of parties and a decision on the merits, which are necessary that a judgment possess before it may be pleaded in bar of a subsequent action. The making of the application and its consideration by this court are *ex parte*. The persons who are to be defendants, if leave to file is granted, are not in court on such application and have no opportunity to resist it. It is clear that if an application for leave to file should be allowed, there would be nothing in the order allowing it that would operate as a bar to the defenses any defendant might interpose.

393 Ill. at 556, 66 N.E.2d at 672.

In reviewing a mandamus case the Appellate Court of Illinois has recently relied on *Monroe v. Collins* to hold that the denial of a motion for leave to file a complaint for mandamus directly with the Illinois Supreme Court does not operate as a bar to a subsequent proceeding in an Illinois circuit court based on the same complaint. *Torjesen v. Smith*, 114 Ill. App. 3d 147, 150, 448 N.E.2d 273,

275 (5th Dist. 1983), appeal dismissed, 465 U.S. 1015. Therefore when the Illinois Supreme Court denied Crump's motion for leave to file a petition for a writ of mandamus, it was without prejudice to his refiling the petition in circuit court. Moreover, as *Monroe* and *Torjesen* illustrate, if the circuit court were to deny Crump's petition for mandamus, he would then be free to seek review in the Illinois appellate courts.

Crump maintains that he did file a petition for a writ of mandamus in an Illinois circuit court in 1974. *People* ex rel. *Crump v. Brantley*, 17 Ill. App. 3d 318, 307 N.E. 2d 651 (1st Dist. 1974), certiorari denied, 419 U.S. 1111. However, because only the most recent parole denial in 1984 is the proper subject of Crump's habeas corpus petition, since it is pursuant to this latest determination that Crump remains in custody, *United States* ex rel. *King v. McGinnis*, 558 F. Supp. 1343, 1345 n.1 (N.D. Ill. 1983), it is obviously impossible for Crump to have raised his claims surrounding the 1984 denial in a petition for mandamus filed in 1974.

Crump makes a more serious argument when he complains that the Illinois Attorney General waived the exhaustion issue in the district court. Indeed, when the district court reinstated Crump's second amended complaint on July 30, 1985, the Attorney General apparently conceded that Crump had fully exhausted his state remedies. In his memorandum opinion below, Judge Plunkett acknowledged this fact when he wrote, "Both sides agree that Crump has exhausted all state court remedies, a prerequisite to this court's consideration of a petition for a writ of habeas corpus." *Crump v. Lane*, No. 82 C 7043, slip op. at 2 (N.D. Ill. Oct. 29, 1985).

The Attorney General now argues that the defendants did not waive the exhaustion issue but merely erred in failing to press it before the district court. Before our decision in *Granberry*, he contends, there was insufficient support in the law for the defendants to have insisted that the district court should dismiss plaintiff's habeas petition for failure to exhaust and instruct him to file a peti-

tion for a writ of mandamus in the proper Illinois circuit court.

The waiver question presented here is similar to that before this Court in *United States* ex rel. *Lockett v. Illinois Parole & Pardon Bd.*, 600 F.2d 116 (7th Cir. 1979). In *Lockett*, the state had failed to raise the exhaustion issue in the district court and in the briefs on appeal. Between the time that the *Lockett* briefs were filed and the oral argument on appeal, this Court handed down a decision which suggested that the petitioner had not exhausted all available state court remedies.[1] Consequently, the state urged the exhaustion issue at the *Lockett* argument for the first time. Acknowledging that the Circuits were divided as to whether the state could waive the exhaustion requirement, we concluded that the exhaustion issue had not been waived by the state in *Lockett* because the state had made no explicit waiver and had orally raised exhaustion before us on appeal. 600 F.2d at 118. Moreover, we concluded that there was no bar to raising the exhaustion issue on our own. *Id.* See *Mattes v. Gagnon*, 700 F.2d 1096, 1098 n.1 (7th Cir. 1983) (court must consider whether petitioner succeeded in exhausting his state remedies as required by § 2254(b), "although the parties do not raise the question").

To be sure, this Circuit has not spoken with one voice on whether the exhaustion requirement may be waived by the state. In *Heirens v. Mizell*, 729 F.2d 449, 457 (7th Cir. 1984), certiorari denied, 469 U.S. 842, the Court in dicta suggested that the exhaustion issue may be waived if the state fails to raise the issue in the proceeding before the district court. The cases cited as authority in *Heirens*, however, did not involve the exhaustion requirement, but merely expressed the general rule that a party on appeal may not raise arguments that were not first presented to the district court. More importantly, in *Granberry*, we

[1] *United States* ex rel. *Williams v. Morris*, 594 F.2d 614 (7th Cir. 1979).

expressly rejected *Heirens* to the extent that it could be read "as suggesting that the exhaustion requirement may be waived by the failure to assert it in the district court." 780 F.2d at 15. The Illinois Attorney General in *Granberry* asserted the exhaustion requirement for the first time on appeal, but we nonetheless concluded that the state had not waived exhaustion and remanded the case to the district court with instructions to dismiss for failure to exhaust state remedies.

Although it was seemingly suggested in dicta in *Granberry* that even an explicit waiver by the state of the exhaustion requirement would be ineffectual, 780 F.2d 15-16, this Circuit has never adopted such a far-reaching rule.[2] In *United States* ex rel. *Russo v. Attorney General of Illinois*, 780 F.2d 712, 714 n.1 (7th Cir. 1986), certiorari denied, 106 S. Ct. 2922, we declined to order *sua sponte* dismissal for failure to exhaust because the state had failed to raise the exhaustion issue both in the district court and on appeal. Similarly, in *Mosley v. Moran*, 798 F.2d 182, 184 (7th Cir. 1986), we held that this Court need not

[2] Two recent Seventh Circuit cases have suggested, while expressly declining to hold, that the state may not waive the defense of exhaustion of state remedies. *Barrera v. Young*, 794 F.2d 1264, 1267-1268, 1269 n.* (7th Cir. 1986); *Walberg v. Israel*, 766 F.2d 1071, 1072 (7th Cir. 1985), certiorari denied, 106 S. Ct. 546. These cases note that the statutory basis of the exhaustion doctrine, § 2254(b), is phrased in mandatory terms. If the satisfaction of § 2254(b) is construed to be a precondition to a federal court's exercising jurisdiction over a habeas corpus action, even an explicit waiver by the state of the exhaustion requirement would not authorize the federal court to reach the merits of the petitioner's claim. In *Walberg*, the court also noted that considerations of comity and federalism should make a federal court determine on its own initiative whether the petitioner has exhausted his state remedies because the state attorney general may not be representing the interests of the state as a collective. *Sua sponte* consideration of the exhaustion requirement by the court of appeals may be necessary if the attorney general is "less zealous in protecting the prerogatives of the state than he ought to be." 766 F.2d at 1072.

always reach the exhaustion issue *sua sponte* when the state has failed to press it on appeal and special circumstances counsel against dismissing the action for failure to exhaust. In *Mosley*, the state had argued exhaustion in the district court but chose not to raise it on appeal. While deciding not to reach the exhaustion issue, we emphasized that "a federal court should reach nonexhausted habeas claims only 'in those rare instances where justice so requires.' " 798 F.2d at 184 (quoting *United States* ex rel. *Trantino v. Hatrack*, 563 F.2d 86, 95 (3d Cir. 1977), certiorari denied, 435 U.S. 928). These cases obviously differ from the one now before us in that the Illinois Attorney General is urgently pressing the exhaustion issue here on appeal.

As indicated above, the Supreme Court on October 6, 1986, granted certiorari in *Granberry*. 107 S. Ct. 62. One of the questions to be presented to the Supreme Court is "Does state's failure to raise issue of non-exhaustion of state court remedies in district court foreclose consideration of that issue on appeal in federal habeas corpus petition brought by state prisoner under 28 U.S.C. § 2254?" 55 U.S.L.W. 3267 (U.S. Oct. 14, 1986). The Court's answer should resolve the uncertainty within our Circuit over the waiver problem, not to mention the division within the Circuits, see *Granberry*, 780 F.2d at 15 (discussing cases from different Circuits). Until the Supreme Court renders its decision, the controlling law in this Circuit is that the state will not be deemed to have waived the exhaustion requirement as long as it presses the issue on appeal.

Moreover, there is an important distinction between this case and *Granberry*. Although the opinion there is silent, it appears that the state's failure to raise the exhaustion issue in the district court in *Granberry* was the result of mere carelessness by the Attorney General. See also *Barrera v. Young*, 794 F.2d 1264, 1267 (7th Cir. 1986) (posing the question as "whether exhaustion of remedies may be waived by oversight"). In this case, like the *Lockett* situation, the state did not argue exhaustion before the district court because until we issued our opinion in *Granberry*, the Attorney General did not believe that he had sufficient support to advance the proposition that a habeas petitioner challenging a parole denial must seek a writ of mandamus in a circuit court in order to satisfy the exhaustion requirement of § 2254(b), even though the Illinois Supreme Court may have previously denied a motion for leave to file an original petition for a writ of mandamus. That the Attorney General was generally concerned with the exhaustion requirement is evidenced by the fact that he was successful in convincing the district court to dismiss Crump's habeas petition in 1984 for failure to exhaust on the ground that he had failed to seek a writ of mandamus in any Illinois court. We therefore conclude that the defendants here have not waived the defense of failure to exhaust state remedies.

As the Attorney General argues, dismissal for failure to exhaust state remedies is particularly appropriate here because the Illinois courts have apparently not yet had an opportunity to interpret the particular provision of the Illinois parole statute under which Crump's due process claims arise. Ill. Rev. Stat. ch. 38, ¶ 1003-3-5(c)(1).[3] This fact takes on special importance in light of the larger question of whether the parole statute creates the sort of "liberty or property" interest entitled to constitutional protection. In *Scott v. Illinois Parole & Pardon Bd.*, 669 F.2d 1185 (7th Cir. 1982) (*per curiam*), certiorari denied, 459 U.S. 1048, this Court held that the Illinois parole statute does create a legitimate expectation of release on parole and thus gives rise to a constitutionally protected liberty interest. The Court noted, however, that the Illinois courts had never interpreted the scope of the interest, if any, which the statute was intended to afford Illinois state prisoners, 669 F.2d at 1189 and n.4, and the decision was

[3] Subsection (c)(1) provides:

> The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; . . . .

based on a prediction about the course of decision in the Illinois state courts. The Illinois courts have yet to construe the Illinois parole statute in light of our decision in *Scott*.[4] Moreover, in *Huggins v. Isenbarger*, 798 F.2d 203 (7th Cir. 1986), this Court held that the Indiana parole statute, similar in most respects to the Illinois statute, did not create a constitutionally protected interest, again on the basis of a prediction about what the Indiana state courts will do. This confusion has led the Supreme Court to grant certiorari in *Allen v. Board of Pardons*, 792 F.2d 1404 (9th Cir. 1986), certiorari granted, 55 U.S.L.W. 3335 (No. 86-461, Nov. 10, 1986), which followed the approach taken in *Scott*, to determine whether the Montana parole statute creates a constitutionally protected "liberty interest entitlement in parole release." The uncertainty surrounding the construction of state parole statutes makes it all the more important to allow the Illinois courts an opportunity to state their view of the meaning of the Illinois parole statute.

We appreciate that the district court has already held a full evidentiary hearing on the merits of Crump's claims.

[4] In *People* ex rel. *Burbank v. Irving*, 108 Ill. App. 3d 697, 439 N.E.2d 554 (3d Dist. 1982), the Appellate Court of Illinois ruled that the Illinois Habeas Corpus Act does not provide relief to a prisoner whose request for parole has been unreasonably, arbitrarily or capriciously denied. In so doing, the court noted that in Illinois the mere existence of a parole system does not transform parole into a legal right and that the decision to modify a prisoner's status from incarceration to parole lies within the largely unreviewable discretion of the Prisoner Review Board. 108 Ill. App. 3d at 702, 439 N.E.2d at 557. Although this decision would tend to suggest that our prediction in *Scott* may not have been correct, we do not find it conclusive because the court was construing the Habeas Corpus Act, not the parole statute. See *Heirens v. Mizell*, 729 F.2d 449, 465-466 n.18 (7th Cir. 1984) (refusing to reconsider *Scott* in light of *Burbank* because it did not directly address whether the Illinois parole statute creates an expectation of parole requiring protection under due process). Furthermore, because it was released shortly after our decision in *Scott*, the decision did not take note of *Scott*.

Unfortunately, this fact in itself does not allow us to circumvent the exhaustion requirement of § 2254(b). It should, however, substantially obviate the need for further fact-finding if Crump chooses to reinstate his action in the district court upon exhausting all available state court remedies.

For the reasons set out above, we remand plaintiff's action to the district court with instructions to dismiss for failure to exhaust state remedies.

II.

Ordinarily our holding that plaintiff failed to exhaust his state remedies would end our consideration of the case on appeal. In addition to his habeas corpus petition, however, Crump has also brought a § 1983 action seeking damages and a declaratory judgment that he is being illegally confined in violation of the United States Constitution. Unlike federal habeas claims, § 1983 actions are not subject to the requirement that the plaintiff must first exhaust all available state court remedies. In *Wolff v. McDonnell*, 418 U.S. 539, the Supreme Court explored the interrelationship between 28 U.S.C. § 2254 and 42 U.S.C. § 1983 in actions brought by prisoners. The Court recognized that in *Preiser v. Rodriguez*, 411 U.S. 475, it had previously held that a writ of habeas corpus is the sole federal remedy for state prisoners challenging the very fact or duration of their confinement and seeking a speedier release. The Court in *Preiser*, however, had also held that "habeas corpus is not an appropriate or available federal remedy" for damages claims, 411 U.S. at 494, and that damages claims could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody. *Id.* at 498-499.

The *Wolff* Court affirmed the holding in *Preiser* and further clarified the distinction between habeas relief and § 1983 actions. While emphasizing that prisoners seeking actual release must first exhaust their available state court remedies, the Court indicated that claims properly brought

under § 1983 may go forward in federal court at the same time. 418 U.S. at 554. Claims properly brought under § 1983 include those seeking damages, a declaratory judgment as a predicate to a damages award, or an injunction against future misconduct. *Id.* at 554-555.[5]

In *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986) (*per curiam*), this Court recently held that a prisoner may not maintain a § 1983 action until he has exhausted all available state remedies if a decision on the civil rights claim would be tantamount to a decision on his entitlement to an immediate or more speedy release. Plaintiff Hanson's § 1983 action alleged that he was arbitrarily denied meritorious good-time credits against his sentence in violation of his constitutional rights under the due process and equal protection clauses. Hanson requested that the district court enter a declaratory judgment and award damages for the alleged deprivation of good-time credits, but he did not request the award or restoration of any credits. Hanson, however, had pending in the Illinois state courts a habeas corpus action raising the identical claims advanced in the § 1983 action. This Court concluded that Hanson raised issues which were properly the basis for a habeas corpus action and therefore held that he could not proceed without first exhausting his state court remedies.

[5] The sole federal remedy for a prisoner who seeks release because of a constitutional defect in his conviction is habeas corpus, even if he seeks damages stemming from his alleged unlawful conviction. See, *e.g.*, *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985) (*per curiam*); *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. 1981); *Parkhurst v. Wyoming*, 641 F.2d 775, 777 (10th Cir. 1981) (*per curiam*); *Williams v. Ward*, 556 F.2d 1143, 1150 (2d Cir. 1977). These decisions are motivated not as much by the considerations laid out by the Supreme Court in *Preiser* as by the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, which bars federal court interference with on-going state criminal proceedings. In these cases, without a requirement that the prisoner first exhaust all available state court remedies, the federal court's resolution of the prisoner's claim for money damages would involve a determination of the validity of a state court conviction simultaneously under review in the state appellate courts.

On its face, this broad holding would appear to conflict with the Supreme Court's decision in *Wolff*. That case involved a § 1983 class action brought by state prisoners challenging on due process grounds the disciplinary procedures used to award good-time credits against their sentences. Following *Preiser*, the Court held that the prisoners were required to seek restoration of good-time credit, which would of course affect their release date, in a habeas corpus proceeding after first exhausting state remedies. It also held, however, that short of ordering the actual restoration of good time already cancelled, the district court could review the allegedly unconstitutional procedures in a § 1983 action and could grant damages, or a declaratory judgment as a predicate to an award of damages, and injunctive relief with regard to future proceedings involving good-time rights. 418 U.S. at 554-555.

Other circuits which have adopted approaches consistent with our result in *Hanson* have attempted to distinguish *Wolff* from those cases in which the § 1983 action raises no issue other than the fact or length of a particular prisoner's confinement. In *Alexander v. Ware*, 714 F.2d 416, 418-419 (5th Cir. 1983), the Fifth Circuit held that where a prisoner challenges a single, isolated constitutional violation resulting in his illegal confinement, he is in essence attacking the fact and duration of his custody and must first resort to habeas and exhaust state remedies. If, however, the prisoner mounts a broad, systematic due process challenge to a prison disciplinary system, or a procedure or policy employed therein, he is in essence challenging the conditions of his confinement, even though the challenged practice may also affect the fact or length of his own confinement, and may pursue a remedy under § 1983.

The Fourth Circuit, in *Todd v. Baskerville*, 712 F.2d 70, 72-73 (4th Cir. 1983), explained that a § 1983 action may be maintained without exhaustion of state remedies when the prisoner's claim (1) alleges a constitutional due process violation relating to prison procedures that do not affect the length or duration of his sentence as then existing, or (2) seeks damages because of mistreatment vio-

lative of constitutional rights and relating strictly to the conditions of his confinement and not its fact or duration. If, however, the core of the prisoner's claim is the length or duration of his sentence and "any claim of damages is purely ancillary to and dependent on a favorable resolution of the length or duration of his sentence," the proceedings must first be in habeas and are subject to exhaustion. 712 F.2d at 73.

It would appear that under certain circumstances at least, a prisoner may pursue a § 1983 action in federal court without first exhausting his state court remedies even though, as in *Wolff*, the claims raised in the § 1983 action are virtually identical to those raised in a habeas corpus proceeding.[6] We need not precisely define those circumstances now because the facts of the instant case are virtually identical to those in *Hanson*.[7] Crump's § 1983

[6] If the prisoner were successful in his § 1983 action, he would be entitled to damages and whatever injunctive relief would be appropriate within the limitations set out in *Wolff*. He would not, of course, be entitled to release. As the Supreme Court noted in *Wolff* at 418 U.S. 554 n.12, however, the adjudication of the federal § 1983 claim may through *res judicata* determine the outcome of the state proceedings in which the prisoner is seeking release.

[7] The difficulty in differentiating between which prisoner petitions are properly brought as § 1983 actions and which are properly brought as habeas corpus actions is further illustrated by the fact that this Circuit allows prisoners to challenge parole denials in § 1983 actions as long as they do not assert a right to be released on parole, but seek only a statement of reasons for the denial or an injunction requiring a rehearing by the Board in accordance with due process. See *Huggins v. Isenbarger*, 798 F.2d 203, 204 (7th Cir. 1986); *Walker v. Prisoner Review Bd.*, 694 F.2d 499, 501 (7th Cir. 1982). Although the relief sought in the § 1983 action might improve the prisoner's chance of parole, these cases maintain that the question of release would still remain within the discretion of the parole board. The holding of these cases has been criticized on the ground that although the complaint may not formally pray for release, the prisoner is actually seeking, sooner or later, just that. *Huggins*, 798 F.2d at 207 (Easterbrook, J., concurring).

action does not challenge the constitutionality of the procedures or the statutory provisions and regulations used by the Illinois Prisoner Review Board in making their decisions. Rather, Crump merely alleges that the Board's repeated decisions to deny him parole violated his constitutional rights to due process and equal protection because they were arbitrary and capricious and based on grounds which were unsupported by the evidence and impermissible under the terms of the Illinois parole statute.

Were we to entertain Crump's § 1983 action and find that the Board's decisions indeed violated his constitutional rights, it would be tantamount to deciding that Crump is being illegally confined in violation of the United States Constitution. In his dissent in *Preiser*, even Justice Brennan acknowledged that where a prisoner's selection of an alternative remedy to habeas corpus undermines and effectively nullifies the habeas exhaustion requirement, the suit should be viewed as "an impermissible attempt to circumvent that requirement." 411 U.S. at 524 n.14. The core of Crump's claim concerns the fact or duration of his confinement, and any award of damages would be entirely dependent upon the favorable resolution of that issue. Before Crump may properly maintain a § 1983 action for damages arising out of his allegedly illegal confinement, he must first exhaust his state court remedies as required by 28 U.S.C. § 2254(b).[8] The judgment of the district court finding in favor of the defendants on the § 1983 claims is vacated.

[8] As we pointed out in *Hanson*, 791 F.2d at 97 and n.8, Crump's right to seek relief under § 1983 will not be prejudiced by the running of the relevant statute of limitations, Ill. Rev. Stat. ch. 110, ¶ 13-202. See *Wilson v. Garcia*, 471 U.S. 261 (appropriate state statute of limitations that federal court must borrow in § 1983 suit is the statute of limitations for personal injury suits). Ill. Rev. Stat. ch. 110, ¶ 13-211 specifically tolls the statute for persons imprisoned on a criminal charge until 2 years after their release. See *Bailey v. Faulkner*, 765 F.2d 102, 104 (7th Cir. 1985) (when federal court borrows a state statute of limitations, it borrows any applicable tolling provisions as well).

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. RUTHE MARIE CARBONA,
Plaintiff,

No. 85 C 1750 v.

JANE E. HUCH, et al.,
Defendants.

Honorable Nicholas J. Bua, Presiding

ORDER

Petitioner brings this habeas corpus petition pursuant to 28 U.S.C. §2254 to challenge the constitutional adequacy of reasons given her for denying her parole request. In *United States ex rel. Johnson v. McGinnis*, 734 F.2d 1193 (7th Cir. 1984), the Seventh Circuit held that Illinois provides a judicial remedy for such a claim by way of mandamus. Petitioner in the instant case filed a motion for leave to file a petition for writ of mandamus in the Illinois Supreme Court. On October 1, 1984, that court summarily denied petitioner's motion.

To exhaust state remedies under 28 U.S.C §2254(b), a state prisoner must give the state courts a fair opportunity to address the claimed violations of her federal constitutional rights. *Toney v. Franzen*, 687 F.2d 1016, 1021 (7th Cir. 1982). Generally, the prisoner must follow the normal appellate or post-conviction procedural routes for pursuing her claim through the state courts. *Carter v.*

Estelle, 677 F.2d 427, 443 (5th Cir. 1982), *cert. denied*, 460 U.S. 1056 (1983). Thus, a state supreme court's denial of a petition for an extraordinary writ does not satisfy the exhaustion requirement where denial did not constitute an adjudication on the merits of the issues presented, and where other more appropriate state remedies are available. *Pitchess v. Davis*, 421 U.S. 482, 488 (1975).

The Illinois Supreme Court's summary denial of petitioner's motion for leave to file her petition for a writ of mandamus clearly did not amount to an adjudication on the merits of her claim. Although Ill. Rev. State. ch. 110A, §381 (1983), authorizes original jurisdiction mandamus in the Illinois Supreme Court, the terms of §381 and relevant case law indicate that it is a highly extraordinary remedy available under limited conditions and awarded rarely. *See Hughes v. Kiley*, 67 Ill.2d 261, 266, 367 N.E.2d 700, 702 (1977); *Touhy v. State Bd. of Elections*, 62 Ill.2d 303, 312, 342 N.E.2d 364, 369 (1976).

In *United States ex rel. Milone v. Greer*, 581 F.Supp. 1251 (N.D. Ill. 1984), this court denied habeas relief where the prisoner had not exhausted Illinois mandamus to contest the denial of parole. The Court's decision rested, in part, on *Sharp v. Klincar*, No. 83 MR 65 (Ill. Jud. Cir. Dec. 5, 1983), where a state circuit court ruled upon the merits of an inmate's constitutional challenge to parole denial. Because petitioner in the present case has not sought mandamus at the circuit court level, we find that she had not exhausted available state court remedies.

Accordingly, petitioner's motion for leave to file in forma pauperis is granted. Because petitioner has failed to exhaust state remedies, however, the habeas corpus petition is dismissed without prejudice. *See Rose v. Lundy*, 455 U.S. 509 (1982). Petitioner's motions for appointment of counsel and for summary judgment are denied as moot.

IT IS SO ORDERED.

/s/ Nicholas J. Bua
Judge, United States District Court

Dated: March 26, 1985